(35) (52) (21)

MOTION FILED Nos. 04-1528, 04-1530, and 04-1697

FEB 10 2005

IN THE

Supreme Court of the United States

NEIL RANDALL, et al.,

Petitioners,

—v.—

WILLIAM H. SORRELL, et al.,

Respondents.

(Caption continued on inside cover)

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, JOHN SHATTUCK, HELEN HERSHKOFF, AND CHARLES S. SIMS, AS FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF RESPONDENTS WILLIAM H. SORRELL, et al.

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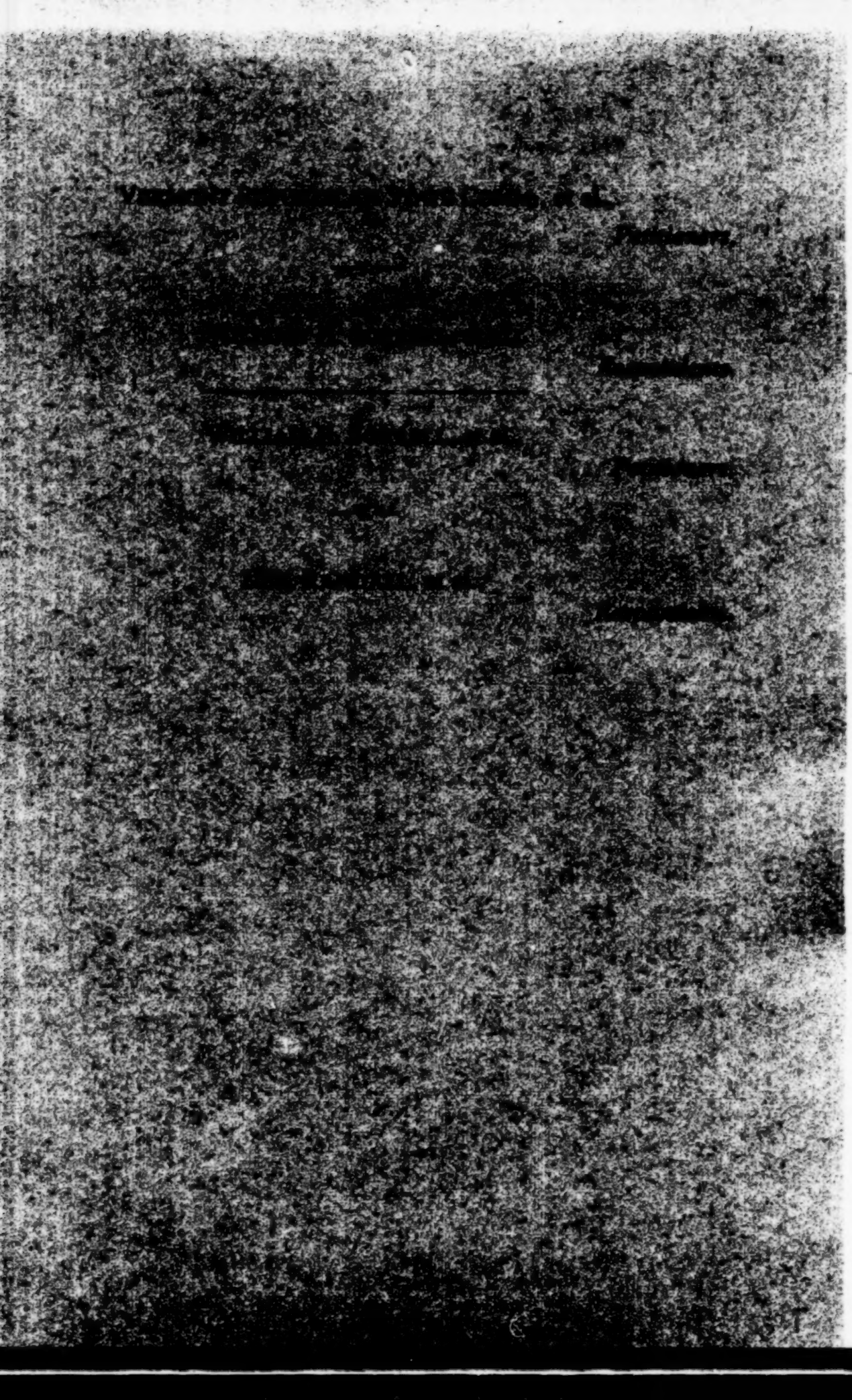

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INTEREST OF AMICI

Amici are former senior officials of the American Civil Liberties Union (ACLU).[1] Norman Dorsen served as President of the ACLU from 1976-1991, and as its General Counsel from 1969-1976. He is currently Stokes Professor of Law at New York University School of Law. Aryeh Neier served as Executive Director of the ACLU from 1973-1981. He is currently President of the Open Society Institute. Burt Neuborne served as Legal Director of the ACLU from 1981-1986. He is currently Inez Millholland Professor of Civil Liberties at New York University School of Law. John Shattuck served as Director of the ACLU's Washington office, and as a National Staff Counsel from 1971-1984. He is currently Executive Director of the JFK Library Foundation. Helen Hershkoff served as an Associate Legal Director of the ACLU from 1987-1995. She is currently Professor of Law at New York University School of Law and co-director of the Arthur Garfield Hays Civil Liberties Program. Charles S. Sims served as an Associate Legal Director of the ACLU from 1983-1986. He is currently a partner in the firm of Proskauer Rose LLP.

While a*mici* continue to support the ACLU's matchless efforts in defense of the First Amendment, we oppose the contention in this case that ceilings on campaign expenditures are categorically unconstitutional. *Amici* believe that generous campaign expenditure ceilings free candidates, voters, campaign contributors and the general public from hydraulic pressures unleashed by a limitless demand for

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[1] All parties have consented to the filing of this brief. Written copies of their consents have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no one other than *amici* has made a monetary contribution to its preparation or submission, other than assistance by New York University School of Law in the brief's production and filing.

campaign funds that impede the development of substantive issues, breed corruption, and decrease the quality of electoral debate. Because *amici* believe that important First Amendment values exist on *both* sides of the regulatory equation in this case, we respectfully submit this brief *amici curiae* urging the Court to permit legislatures to enact generous ceilings on campaign expenditures.

SUMMARY OF ARGUMENT:

THE CURRENT LEGAL AND FACTUAL CONTEXT

As Chief Judge Walker noted below, most lower courts read *Buckley v. Valeo*, 424 U.S. 1 (1976), as requiring the invalidation of all government-imposed ceilings on campaign expenditures by candidates,[2] no matter how generous the ceiling. *Landell v. Sorrell*, 406 F.3d 159, 170 (2d Cir. 2005) (Walker, C.J., dissenting from the denial of rehearing *en banc*). *See Homans v. City of Albuquerque*, 366 F.3d 900, 914 (10th Cir.) (invalidating spending ceiling), *cert. denied*, 125 S. Ct. 625 (2004); *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-19 (6th Cir. 1998) (same); *see also Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312 (9th Cir. 1992).

Indeed, in the thirty years since *Buckley*, although the precise question of a candidate-expenditure limit has not reached the Court, this Court has not sustained a government effort to limit campaign expenditures outside the narrow context of corporate spending. *Compare FEC v. NCPAC*, 470 U.S. 480 (1985) (invalidating limit on uncoordinated independent expenditures); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on use of paid petition signature gatherers); *Colorado Repub. Fed'l Campaign Comm v. FEC*, 518 U.S. 604 (1996) (invalidating ban on independent expenditures by political party prior to the selection of its

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[2] This case does not involve the related but analytically distinct issue of efforts to limit independent campaign expenditures by third-persons.

candidate) *with Austin v. Michigan Chamber of Commerce*, 494 U:S. 652 (1990) (upholding ban on corporate campaign spending).[3]

Conversely, in the years since *Buckley*, this Court has repeatedly sustained government efforts to limit the size, source and timing of campaign contributions. *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (sustaining contribution limits to PACS); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (sustaining state contribution limits); *FEC v. Beaumont*, 539 U.S. 146 (2003) (sustaining corporate contribution limits); *McConnell v. FEC*, 540 U.S. 93 (2003) (sustaining comprehensive regulation of contributions).[4]

The differential judicial treatment of campaign contributions and expenditures flows directly from *Buckley*'s analytic framework. As Justice Stevens explained in *McConnell*, the *Buckley* Court viewed campaign expenditures as a form of direct speech by candidates. *McConnell*, 540 U.S. at 120-21.[5] As such, campaign expenditures may be regulated only if necessary to advance a compelling government interest. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (applying classic First Amendment weighted balancing test to uphold bans on electioneering within 100 feet of the polls).

Buckley held that the Federal Election Campaign Act's spending ceilings failed to advance a compelling governmental interest. The *Buckley* Court ruled, first, that the government's undoubted interest in equalizing political

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[3] *See FEC v. MCFL*, 479 U.S. 238 (1986) (recognizing "grassroots" exception to *Austin*).

[4] Coordinated expenditures have been treated as contributions. *See FEC v. Colorado Repub. Fed'l Campaign Comm.*, 533 U.S. 431 (2001).

[5] Justice Stevens has consistently questioned the equivalence between speech and money inherent in the *Buckley* analysis. *See Shrink Missouri*, 528 U.S. at 398 (Stevens, J., concurring).

power based on wealth did not empower it to limit the speech of the wealthy in order to enhance the relative political power of the less wealthy. *Buckley*, 424 U.S. at 48-49, 56-57.[6]

Second, because the *Buckley* Court did not perceive a link between expenditures and corruption, *id.* at 45-47, 55-56, the Court rejected avoidance of corruption as a justification for placing a ceiling on campaign expenditures. Accordingly, the Court did not consider whether a demonstrated link between unlimited campaign spending and an increased risk of corruption would justify a prophylactic limit on expenditures.

Third, the *Buckley* Court rejected the notion that a compelling government interest existed in reducing "wasteful, excessive or unwise" campaign spending for its own sake. *Id* at 57. Once again, the *Buckley* Court did not consider whether a showing that runaway campaign spending was adversely affecting the nature and quality of the democratic process would justify a spending ceiling. Rather, the *Buckley* Court viewed the asserted interest in reducing spending as resting solely on paternalism, and rejected it on that basis.

Unlike campaign expenditures, Justice Stevens noted in *McConnell*, the *Buckley* Court viewed campaign contributions as a form of indirect speech posing a risk of corruption. *McConnell*, 540 U.S. at 134-38. As such, the regulation of campaign contributions is subject to a less rigorous form of scrutiny, demanding only that the contribution limit be "closely drawn to match a sufficiently important interest." *Id.* at 136 (quoting *Beaumont*, 539 U.S.

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[6] The *Buckley* Court acknowledged the legitimacy of a government interest in minimizing political disparities based on wealth, but noted that strengthening the economically weak speaker was the constitutionally preferred option. *Id.* at 48-49. *See Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 284-86 (S.D.N.Y.) (upholding expenditure ceiling as *quid pro quo* for voluntary campaign subsidy), *aff'd mem.*, 445 U.S. 995 (1980).

at 162). Because *Buckley* recognized a link between contributions and corruption, contribution limits are valid as long as the legislature's fear of corruption is plausible, and the contribution ceiling permits a candidate to amass sufficient resources to engage in effective advocacy. *See Shrink Missouri*, 528 U.S. at 395-96.

While the *Buckley* Court's bright-line distinction between campaign expenditures and campaign contributions has been the subject of criticism, *see Shrink Missouri*, 528 U.S. at 405-10 (Kennedy, J., dissenting); *id.* at 410-20 (Thomas, J., dissenting), it has become an entrenched principle of the law of campaign finance regulation. *McConnell v. FEC*, 540 U.S. 93 (2003). The net result is a judicially-imposed campaign-finance regulatory regime that limits the supply of campaign funds, but places the demand for campaign cash beyond government regulation. *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311 (criticizing the existing regulatory model).

As with any regulatory regime that limits supply but not demand, the current funding of American democracy exhibits serious dysfunction.

First, the inability to place generous ceilings on campaign expenditures places candidates in a classic prisoner's dilemma, trapping many candidates in an electoral version of the nuclear arms spiral,[7] in which rival candidates are forced to raise and spend additional campaign funds (even though neither wishes to do so) because of a rational fear that unilateral financial disarmament will enable an opponent to gain a competitive advantage. *See generally* Garrett Hardin, *The Tragedy of the Commons*, Science, pp. 1243-48 (Dec.13, 1968); Thomas C. Schelling, *The Strategy of Conflict* (1980

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[7] See Phillip Schrodt, *Richardson's Arms Race Model*, National Collegiate Software Clearinghouse, Raleigh, North Carolina (1987) (describing the model of the nuclear arms race developed by Lewis Fry Richardson).

ed.); Robert Axelrod, *The Evolution of Cooperation* (1984); William Poundstone, *Prisoner's Dilemma* (1993); James D. Miller, *Game Theory at Work* (2003).[8]

Second, rational competitive behavior triggered by a prisoner's dilemma, creates an unending search, and a desperate need, for campaign funds, empowering self-interested contributors to exact *quid pro quos* – and worse from candidates who must obtain the contributions to keep pace with an opponent. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund Raising: Why Campaign Speech Limits May Not Violate the First Amendment*, 94 Colum. L. Rev. 1281, 1284-89 (1994); *see also* Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 Election L. J. 147, 174 (2004); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705, 1710-11, 1736 (1999).

Third, the hydraulic fundraising pressure generated by an uncontrollable demand for campaign cash tempts incumbents to place inappropriate pressure on potential contributors,[9] and encourages both candidates and contributors to seek an unending parade of loopholes – or worse - placing the regulatory system under perennial siege. *See Colorado Repub.* 533 U.S. at 457 ("[S]ubstantial

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[8] For an application of prisoner's dilemma game theory to the area of campaign financing, see Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem* (Available at http://law.bepress.com/cgi/viewcontent.cgi?article=2317&context=expresso) (last visited February 8, 2006).

[9] One need look no further than the current headlines to see examples of the fundraising frenzy unleashed by a limitless demand for campaign funds. *See* Anne E. Kornblut, *Lobbyist Accepts Plea Deal and Becomes Star Witness in a Wider Corruption Case*, N.Y. Times, Jan. 4, 2006, at A1; Philip Shenon, *Top Aide to DeLay Pleads Guilty to Conspiracy*, N.Y. Times, Nov. 22, 2005, at A21; Philip Shenon & Carl Hulse, *DeLay is Indicted in Texas Case and Forfeits G.O.P. House Post*, N.Y. Times, Sept. 29, 2005, at A1.

evidence demonstrates how candidates, donors, and parties test the current limit of the law and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced. . . .").

Fourth, independently wealthy candidates are granted an enormous artificial advantage because they may expend unlimited campaign sums without the inconvenience of raising the funds through an expensive and time-consuming regulated process, enabling them to distort political processes without regard to public support. *See* Stephen Loffredo. *Poverty, Democracy and Constitutional Law*, 141 U. Pa. L. Rev. 1277, 1271-73 (1993).[10]

Finally, the impossibility of capping campaign expenditures acts as an invitation to dramatically out-spend a financially weaker opponent, leading to many elections in which one candidate so dominates the debate because of massively superior resources that an opponent is literally drowned out.[11]

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[10] Recent elections in New York and New Jersey exemplify the trend to candidates of great personal wealth. *See* David Chen, *Bloomberg Cruises to Re-election Victory; Corzine is Winner in Costly New Jersey Race*, N.Y. Times, Nov. 9, 2005, at A1.

[11] Two disturbing sets of statistics describe the movement toward overwhelming financial advantage in congressional races. In the 1998-2002 congressional elections, winning candidates accounted for 82% of campaign expenditures. Moreover, median spending by incumbents in high-risk competitive congressional districts increased from $596,000 in 1992-94 to $910,000 in 2002-2004, while median spending by challengers in high risk competitive congressional districts actually *decreased* from $229,000 to $198,000 over the same period. The recent figures are drawn from *The Almanac of American Politics* and the c-span.org web site, and are helpfully summarized in Allan I. Abramowitz, et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75-88 (Feb. 2006) (ascribing lack of competition to advantages of incumbency, especially the ability to massively outspend a challenger).

In short, the existing regime of constitutionally-mandated unlimited campaign expenditures exacts a terrible toll on American democracy, adversely affecting the First Amendment interests of candidates, contributors, voters and the public. While some candidates have a First Amendment interest in expending unlimited sums in seeking to overwhelm an opponent, most candidates and voters have important competing First Amendment interests that are jeopardized by unlimited campaign spending. These include an opponent's First Amendment interest in being heard over the din of a candidate with massively superior financing; a voter's First Amendment interest in hearing both sides of a political issue before voting; a citizen's First Amendment interest in a government that does not appear to be bought and paid for; and, most importantly, the First Amendment interests of the vast bulk of candidates who wish, at some point, to stop raising funds and to concentrate on substance, but who are unable to do so because they are trapped in a classic arms race spiral, driven by a fear that unilateral financial disarmament may be lethal.

Amici believe that the presence of important First Amendment interests on both sides of this case should translate into greater deference to legislative judgments that as long as a spending ceiling is sufficiently generous to permit effective and robust advocacy, the First Amendment benefits of capping campaign expenditures outweigh the First Amendment interests of candidates wishing to engage in unlimited spending. *See Shrink Missouri*, 528 U.S. at 399 (Breyer, J., concurring).

Accordingly, *amici* urge the Court to accept Justice Kennedy's challenge in *Shrink Missouri* to reconsider dicta in *Buckley* in a manner that permits states to enact comprehensive regulation of both campaign contributions and expenditures in order to free candidates from an endless spiral of fundraising and to permit them to focus their

energies on the substance of their campaigns. *Shrink Missouri*, 528 U.S. at 405, 409 (Kennedy, J., dissenting).

ARGUMENT

I. Generous Expenditure Ceilings Are Constitutional Because They: (A) Free Candidates From an Endless Spiral of Fundraising; (B) Counteract the Risk of Corruption Generated By Such an Endless Fundraising Spiral; and (C) Advance the First Amendment Interests of Voters, the General Public, and the Vast Bulk of Candidates.

A. Introduction: The Available Options

Multiple approaches exist to the issue of campaign funding. One possible approach is to abandon the effort to regulate the campaign funding process altogether, leaving candidates and contributors free to raise and spend campaign funds without restriction as to size or source. Of course, even if no limits existed on campaign contributions, the persistence of an unlimited demand for campaign cash would continue to trap candidates in a prisoners' dilemma, with each candidate forced to raise unlimited amounts from self-interested donors. While a legislature could, of course, opt for such complete deregulation, the settled course of this Court's campaign finance jurisprudence upholding the regulation of campaign contributions because of the risk of corruption makes that choice clearly one for the people. Accordingly, any insistence that the First Amendment disables American democracy from defending itself against corruption and cynicism by forcing it to endure a constitutionally-imposed regime of unrestricted campaign contributions is untenable. *See McConnell*, 540 U.S. at 153 ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their

constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.").

Second, one could believe that public funding of elections is the best way to finance democracy. Twenty-first century government funds many activities that were once the province of private enterprise – building roads, policing the community, maintaining a Navy, providing education, operating mass transit, printing election ballots, administering elections. Adding the funding of the electoral campaign to that list is an obvious possibility.[12] Once again, however, the choice between government and private funding of the electoral process is one for the people to make. *Harris v. McCrae*, 448 U.S. 297, 313-18 (1980).

Third, one could regulate both campaign expenditures and contributions in a coordinated effort to assure generous campaign funding and robust political advocacy, without suffering the dysfunctions attributable to a completely deregulated process, or to a regime of unrestricted spending by candidates and contributors. *Shrink Missouri*, 528 U.S. at 405, 409 (Kennedy, J., dissenting); *id.* at 399, 405 (Breyer, J., concurring).

The one approach that *amici* believe cannot be defended would be to continue the current practice of regulating the supply of campaign funds in an effort to limit corruption, while insulating demand for campaign funds from any and all efforts at regulation. The resulting imbalance between restricted supply and unlimited demand breeds corruption, impedes the development of substantive ideas, and contributes to the elimination of competitive elections.

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[12] For a survey of current public financing provisions, see John M. De Figueiredo and Elizabeth Garrett, *Paying for Politics*, 78 S. Cal. L. Rev. 591, 627-640, 651 (2005).

Accordingly, while *amici* believe that *Buckley* was correctly decided on its facts because the expenditure ceilings before the Court in that case were constitutionally inadequate, the dicta in *Buckley* that has been read as invalidating any effort to limit campaign expenditures no matter how generous the ceiling, and no matter how compelling the interest in restriction, should be reconsidered in light of more than thirty years of experience.[13] Generous candidate expenditure limits that permit candidates to expend "the resources necessary for effective advocacy" *Shrink Missouri*, 528 U.S. at 396 (quoting *Buckley*, 424 U.S. at 21), do not violate the First Amendment.

B. Generous Expenditure Ceilings Advance the Autonomy of Candidates by Freeing Them From Becoming Trapped in an Endless Spiral of Reciprocal "Defensive" Fundraising

Buckley employed classic First Amendment methodology. Since the *Buckley* Court determined that the relationship between campaign spending and campaign speech is so close that regulation of one is the functional equivalent of regulating the other, the Court applied a weighted balancing test derived from *Brandenburg v. Ohio*, 395 U.S. 444 (1969) to measure the constitutionality of spending ceilings. Under the *Brandenburg* test, an expenditure limit must be narrowly tailored to advance a

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[13] Such a reconsideration would not require the Court to overrule its holding in *Buckley* for two reasons. First, *Buckley*'s dicta is not entitled to any *stare decisis* effect. *See United States v. Gaudin*, 515 U.S. 506, 522 (1995); *United States v. Dixon*, 509 U.S. 688, 714 (1993) (Rehnquist, C.J., concurring in part and dissenting in part). Second, the *Buckley* Court never considered the consequences of a prisoner's dilemma on unlimited campaign spending. See *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005) (upholding statute against First Amendment challenge on basis of government speech theory neither raised nor considered in prior cases invalidating similar statutes).

compelling state interest in order satisfy the First Amendment.

The government asserted three potential compelling interests in support of the candidate expenditure limit in *Buckley* – the avoidance of corruption, the advancement of political equality, and the desire to reduce the cost of campaigning. The *Buckley* Court rejected the equality interest, ruling that the First Amendment does not permit an effort to equalize speech by silencing the strong speaker. *Buckley*, 424 U.S. at 56-57. The Court rejected the anti-corruption justification, as well, reasoning that an expenditure did not involve a payment from a third-person, and was, therefore, not susceptible to corruption. *Id* at 55-56. Third, the Court rejected a general interest in lowering the cost of campaigning as a paternalistic effort to deem all spending above the limit "wasteful, excessive, or unwise." *Id.* at 57.

In the more than 30 years since *Buckley*, nothing has occurred to cast doubt on the Court's perception that the spending ceilings imposed by Congress in 1974 were too low to permit robust and effective advocacy, especially by candidates challenging incumbents, and their supporters. Individuals could only expend $1,000 on any particular candidate's campaign – approximately one-seventh of the cost of a one-page newspaper advertisement. *Id.* at 19 n.20. As the Court rightly recognized, this would foreclose virtually all individuals "from any use of the most effective modes of communication." *Id.* at 19. Although the candidate and party spending caps were somewhat more generous, they would have forced many candidates to curtail the scope of their campaigns. *Id.* at 19 n.21. Taken together, FECA's restrictions left little room for the kind of robust advocacy at the heart of the First Amendment.

But much has occurred casting doubt on the Court's dicta that expenditure ceilings do not advance a compelling state

interest. *Buckley* simply never considered what the past 30 years has abundantly demonstrated - absent expenditure limits, candidates, trapped in a prisoner's dilemma, must devote excessive time and energy to raising campaign funds, rendering themselves vulnerable to corruption, and unable to engage in the serious and time-consuming substantive work required of a candidate for public office.

The heart of the *Buckley* analysis was a decision to protect the autonomy of candidates. The Court reasoned that the right of a candidate to make an autonomous decision about how much money to spend is core political activity protected by the First Amendment. In support of its decision, the *Buckley* Court employed a now-familiar metaphor, analogizing money to gasoline, and campaigning to a drive in the country. *Id.* at 19, n.18.

According to the metaphor, a car/campaign is able to progress only as far as gasoline/money is available to power it. But the metaphor is deeply flawed. A political campaign is not a unilateral drive in the country, with the driver making autonomous decisions about how far he or she wishes to drive. Rather, it is a winner-take-all competition between at least two drivers, with the decision of each driver/candidate about how much gasoline/money to expend affecting and being affected by the spending of rivals. In the absence of spending ceilings binding on each candidate, rational rivals will continue to raise and spend campaign cash long after each has raised and spent sufficient funds to carry out effective and robust advocacy, not because each candidate wishes to continue the "gyre" of fundraising, but in order to guard against being outspent by a rival. Blasi, *supra*, at 1284-89, 1309; Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004). Thus, far from protecting candidate autonomy, *Buckley*'s scheme actually circumscribes it.

As with any prisoner's dilemma, in the absence of collective action, formal autonomy is overwhelmed by inexorable pressure to anticipate and react to actions by rivals. Under such circumstances, genuine autonomy is possible only if both participants are constrained by collective action. *See supra* at 5-6 & nn. 7-8.

As this Court noted in *Buckley*, an intimate link exists between money and speech, placing rival candidates in a position similar to rival powers in a nuclear arms race. During the Cold War, once each side had amassed an arsenal capable of destroying the other, neither side had an interest in continuing to expend scarce resources on enormously expensive new weapons systems. But in the absence of a collective action solution, neither power could trust the other to refrain from the deployment of new weapons that might permit the other to gain a material, potentially lethal, advantage. The result was a series of reciprocal "involuntary" investments in nuclear arms that diverted scarce resources from other uses, harming the economy and social structure of both powers – eventually causing the Soviet Union to implode, and the United States to defer badly needed repairs to its infrastructure and its social fabric. *See* Schrodt, *Richardson's Arms Race Model*, *supra* (describing the model of the nuclear arms race developed by Lewis Fry Richardson).

In fact, while the Soviet Union and the United States were formally autonomous during the nuclear arms race, indeed, each occupied the summit of power, each was a hostage to the real or perceived actions of its rival. Formal autonomy existed; but it was the false autonomy of the prisoner's dilemma. *See* Schelling, *supra*, at Appendix A "Nuclear Weapons and Limited War."

Competitive political candidates in a regime of constitutionally-mandated limitless campaign spending exhibit the same prisoner's dilemma. In the absence of

collective action in the form of a generous spending ceiling, even after each candidate has amassed resources sufficient to engage in effective and robust advocacy, neither dares to stop raising money because of a fear that the rival will gain a competitive financial advantage. The net result is the massive and never-ending diversion of candidates' time and energy from substantive tasks, such as the development of programs and discussion of issues, to an involuntary spiral of fundraising and related tasks. *See* Blasi, *supra*, at 1285 ("No matter how long his tenure, how prominent his position, how favorable the electoral arithmetic in his district, how unimpressive and under-financed his last opponent was, . . . almost every member of Congress feels the need to amass a large war chest, just in case."); Issacharoff and Karlan, *supra*, at 1737 (observing that *Buckley*'s scheme "ha[s] made candidates and politicians into perpetual fundraisers").

Even when such an involuntary spiral does not end in corruption, it drains candidates of the time and energy needed to devote themselves to the tasks of substantive governance. As long as the expenditure ceiling is set high enough to permit effective and robust campaign advocacy, the state has a compelling interest in freeing candidates from such a prisoner's dilemma. See *Shrink Missouri*, 528 U.S. at 409 (Kennedy, J., dissenting); *Colorado Repub. Fed'l Campaign Comm., v. FEC*, 518 U.S. 604, 649-50 (1996) (Stevens, J., dissenting).

The *Buckley* Court never considered the loss of candidate autonomy caused by a failure to establish a generous ceiling on campaign spending. Indeed, in striking down the expenditure limits before it, the *Buckley* Court appeared to be attempting to maximize the autonomy of candidates to spend as much – or as little – as they wished. Given the competitive nature of elections, however, we now understand that a constitutionally-mandated regime of unregulated campaign spending does not maximize candidate autonomy. Instead, it significantly erodes candidate autonomy by pressuring

candidates to raise and spend funds long after sufficient resources for effective and robust advocacy have been amassed, and long after they no longer wish to devote enormous time and energy to the fundraising process. Thus, as long as the ceiling is set sufficiently high to permit effective advocacy, a generous spending cap actually enhances the autonomy of both candidates.[14] Only the coordinated legislative approach envisioned by Justice Kennedy in *Shrink Missouri* that combines appropriate restrictions on campaign contributions and generous ceilings on campaign spending is capable of balancing the competing First Amendment interests of all participants in the electoral process.

C. Generous Expenditure Ceilings Counteract the Risk of Corruption Generated by "Defensive" Fundraising

Because an election is a contest, rival candidates react to each other's activities. When the activity is campaign oratory, the response is the counter-speech needed to inform the electorate. When, however, the activity is a real or perceived fund-raising advantage, a competitive candidate must respond with counter-fundraising, or else risk being unable to respond to a rival's campaign positions. *See* Issacharoff & Karlan, *supra*, at 1708 n.17 ("While spending money is by its very nature susceptible to incremental decision making, electoral outcomes in our winner-take-all system are binary: you either win or you lose. So why cut it close?").

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[14] As Judge Winter noted in his dissent below, nuclear arms and campaign spending are not equivalents. *Landell v. Sorrell*, 382 F.3d 91, 196 (2nd Cir. 2004) (Winter, J. dissenting). The former causes harm; the latter powers democracy. As the Court noted in *Buckley*, there is no general interest in removing money from campaigns. Rather, the salience of the arms race analogy is in the loss of candidate autonomy, leading to frenzied fundraising, excessive dependence on large donors, and inadequate time for substance.

When campaign spending ceilings exist at a level permitting robust oratory, the pressure to react to a rival's fundraising, while real, is mitigated by the ability of each candidate to plateau eventually at a maximum funding level that permits effective advocacy. When spending is capped, therefore, a donor who appears to expect inappropriate returns on his or her "investment" can be replaced by other donors. But when no ceiling exists, a fertile breeding ground exists for improper overtures by candidates, and inappropriate understandings with self-interested donors. That is why, as this Court has often noted, candidates, parties, and their donors, trapped in the prisoner's dilemma, aggressively push the limits of the law in an effort to satisfy the insatiable demand for more funds. *See McConnell*, 540 U.S. at 144, 165; *Colorado Repub.*, 533 U.S. at 457.

This Court has repeatedly recognized that the state has a compelling interest in minimizing real or apparent corruption in the electoral process. See *McConnell*, 540 at 136-37, 143-44; *Shrink Missouri*, 528 U.S. at 390; *Buckley*, 424 U.S. at 26-28. *Quid pro quo* corruption strikes at the heart of democracy by substituting venal motives for the search for the common good. Apparent corruption is scarcely less dangerous, eroding the faith in the system without which no democracy can flourish. "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri*, 528 U.S. at 390.

Not surprisingly therefore, this Court has deferred to the legislature in identifying potential sources of corruption, and putting into place prophylactic regulatory regimes designed to prevent its appearance and/or reality. *McConnell*, 540 U.S. at 137, 165-66, 171; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for

prophylactic measures where corruption is the evil to be feared").

The deference due a legislature's choice of prophylactic means to root out corruption in the electoral system reflects the existence of broad legislative discretion when, as here, First Amendment interests exist on both sides of the regulatory equation. *Cf. Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673-75 (1998); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 192-96 (1997); *Burson v Freeman*, 504 U.S. 191 (1992) (plurality opinion). In *Burson*, the Court upheld a ban on electioneering within 100 feet of a polling place in order to protect voters against subtle forms of intimidation. *Id.* at 208-09, 211. The prophylactic ban on speech in *Burson* survived strict scrutiny because constitutionally protected interests lay on both sides of the equation, requiring a degree of deference to the legislative judgment that the interest of speakers had to give way in order to ensure the integrity of the electoral process. *Id.*; *Shrink Missouri*, 528 U.S. at 400 (Breyer, J., concurring).

In *Buckley*, the Court did not perceive a link between limitless campaign expenditures and the potential for real or apparent corruption. But 30 years of experience has taught that *Buckley* overlooked the competitive nature of an electoral campaign. If an electoral campaign were a unilateral drive in the country, *Buckley*'s estimate of the link between campaign expenditures and corruption would be correct. But campaigns are not drives in the country; they are winner take all automobile races. It is bad enough when one driver in the race has an unfair advantage in fuel. It becomes intolerable when the competitive need for an unlimited quantity of fuel forces both drivers to seek it endlessly under circumstances that breed corruption and erode the capacity of both drivers to consider the direction the cars should go.

D. Generous Expenditure Ceilings Advance the First Amendment Interests of Voters, the General Public, and the Vast Bulk of Candidates.

Unlimited campaign spending adversely affects the quality of the electoral process in several ways. The never-ending "gyre" of unlimited fundraising diverts the finite intellectual and physical resources of a campaign from substance to the mechanics of fundraising. At worst, the candidate's campaign speech is limited to ideas and themes that will generate financial support from the narrow class of self-interested donors. *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy and Participation*, 155 U. Pa. L. Rev. 73 (1994). At best, the candidate's time and attention is so taken up with fundraising that substance becomes an afterthought. Either way, voters are denied the full spectrum of substantive information needed to make an informed political choice.

Moreover, the prospect of raising so much money that a rival can be drowned out by massively superior resources often results in an electorate that has been subjected to a barrage on one side of the issues without effective presentation of the counter-arguments. For example, in the 1998-2002 congressional elections, winning candidates accounted for 82% of campaign expenditures. Moreover, while median spending by incumbents in high-risk competitive congressional districts increased from $596,000 in 1992-94 to $910,000 in 2002-2004, spending by challengers in high risk competitive congressional districts actually *decreased* from $229,000 to $198,000 over the same period. *See* Abramowitz, et al., *supra*, at 75-88 (ascribing lack of competition to advantages of incumbency, especially the ability to massively outspend a challenger).

While a generous spending ceiling is not intended to, and does not, assure resource equivalence, it can act to limit the effect of massive resource imbalance by preventing the

loudspeakers of one candidate from being set at a volume that effectively drowns out the speech of a rival.

Voters obviously benefit when candidates are free from settings in which corruption is endemic and attention to substance impossible. A modicum of trust in the system is a necessary incident of a successful democracy. The never-ending scramble for funds made necessary by a constitutionally-mandated failure to cap campaign spending erodes that trust. "Democracy works 'only if the people have faith in those who govern and that faith is bound to be shattered when high government officials . . . engage in activities which arouse suspicions of malfeasance and corruption.'" *Shrink Missouri*, 528 U.S. at 390 (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

Generous spending ceilings remove the unrelenting pressure to raise and spend more than one's rival – and thus permit greater attention to substance in a world not constantly dominated by the need to raise more money. As long as the ceiling is set at a point where it does not interfere with robust and effective advocacy, spending ceilings advance the compelling interest of restoring faith in the democratic process.

Finally, the vast bulk of candidates benefit when they can turn their attention to substance, free from the burden of constantly raising additional funds. The rare candidate may wish to raise unlimited funds to annihilate an opponent, but the vast bulk of candidates wish to raise enough funds to assure effective and robust advocacy, and then to devote themselves to the effective delivery of their ideas. Current practice makes such behavior impossible because candidates must engage in a perpetual financial arms race to prevent an opponent from gaining an advantage. Collective action, in the form of a spending ceiling that permits robust advocacy,

frees the candidate to concentrate on the issues, not on the perennial search for defensive dollars.

The interests of: (a) voters in receiving optimal information; (b) the general public in trusting the electoral system; and (c) candidates in devoting themselves to ideas, are as worthy of First Amendment protection as is the interest of a wealthy candidate in spending limitless amounts to swamp an underfinanced opponent. Since important First Amendment interests exist on both sides of the regulatory equation – and since the area falls within the expertise of the legislature – as long as a spending ceiling is set high enough to permit effective advocacy, the ultimate balance between and among conflicting First Amendment interests should rest with the legislature. *See Shrink Missouri*, 528 U.S. at 401 (Breyer, J., concurring) (observing that campaign finance restrictions "seek to build public confidence in th[e electoral] process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes"); *Landell*, 406 F.3d at 161-63 (Calabresi, J., concurring in denial of rehearing *en banc*) (emphasizing significant First Amendment interest in ensuring that all persons, not only wealthy donors, have an equal right to express the intensity of their political ideas and affiliations); *see also* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 46-47 (2005).

II. Unduly Low Spending Ceilings That Prevent the Expenditure of Resources Needed for Effective Campaign Advocacy Violate the First Amendment

Under any standard of review, unrealistically low campaign spending ceilings violate the First Amendment because they deprive candidates of the ability to expend funds needed for effective advocacy. If either contribution or spending ceilings are too low for effective advocacy, challengers will have a difficult time waging campaigns

against incumbents whose name and messages may already be well known to the voting public. *Shrink Missouri*, 5[illegible] U.S. at 404 (Breyer, J., concurring). On the other hand, the absence of generous spending ceilings, incumbents have demonstrated an overwhelming capacity to swamp challengers by exploiting the built-in fundraising advantage enjoyed by an incumbent.

It is impossible, on the current record, to determine whether the spending ceilings imposed by Vermont will unduly burden candidates in expending funds needed for effective advocacy. The answer to that question requires a fuller hearing below on the practical effect that such limits will have on the ability of candidates in Vermont to expend resources needed for robust discussion of campaign issues. While the district court conducted an inquiry into whether the ceilings accorded with past s[illegible]nding practices, and elicited some evidence concerning the impact of the ceiling on campaigning, with respect, the First Amendment requires a more searching inquiry.

The issue should not be whether ceilings will silence a candidate, or drive campaign speech below historic levels. Rather, it is whether a given ceiling will materially interfere with effective campaign advocacy. This Court has already vested the trial courts with the duty of conducting similar pragmatic fact-based inquiries in at least two related contexts. The identical legal standard is used to measure whether contribution limits are too low to permit a candidate to "amass" sufficient funds for effective advocacy. *See Shrink Missouri*, 528 U.S. at 396.

The Court's ballot access cases teach a similar lesson. When a legislature regulates access to the ballot, this Court tests the statute's constitutionality by asking whether it unduly burdens the ability of candidates and their supporters to attain a place on the ballot. *See Anderson v. Celebrezze*, 460 U.S. 783, 789-90, 792-94 (1983); *Storer v. Brown*, 415

U.S. 724, 728-30 (1974). A reviewing court is obliged to view the statute pragmatically in the context of local conditions and to gauge whether it unduly inhibits ballot access. A similar pragmatic assessment is required to determine whether spending ceilings unduly burden a candidate's capacity for robust and effective campaign advocacy. Since the district court in this case has yet to conduct this inquiry, a remand is necessary.

CONCLUSION

The decision of the court below should be affirmed, and the matter remanded to the District Court for a determination of whether the spending limits before the Court will permit sufficiently effective and robust campaign advocacy to satisfy rigorous First Amendment standards.

Dated: February 10, 2006
New York, New York

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